

AMANAH RAYA CAPITAL SDN BHD

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v.

SITI ZAHARAH SULAIMAN

HIGH COURT MALAYA, KUALA LUMPUR

B

NALLINI PATHMANATHAN J

[CIVIL SUIT NO: 22-NCC-25-01-2013]

7 MAY 2013

MONEYLENDERS: *Moneylending transaction - Monies due and owing - Claim for - Moneylending agreement - Failure to use prescribed form - Schedules J & K of Moneylenders (Control and Licensing) Regulations 2003 - Whether agreement void and unenforceable - Exemption under PU(B) 35/2009 - Whether applied solely to plaintiff - Whether plaintiff could rely on s. 66 Contracts Act 1950 - Whether defendant accepted terms in agreement - Whether PU(B) 35/2009 overrides provisions of terms in agreement - Moneylenders Act 1951, ss. 10P & 21(1)*

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MONEYLENDERS: *Interest - Excessive interest - Moneylending agreement - Whether interest charged in excess of statutory rate - Whether plaintiff may levy more than 12% interest in respect of secured loans - Whether tenure of facility for two years - Whether interest levied at 16%*

E

MONEYLENDERS: *Accounts - Statement of - Whether produced in court - Provisions of ss. 19 & 21 Moneylenders Act 1951 - Whether complied - Exemption under PU(B) 35/2009 - Whether applicable to plaintiff*

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CONTRACT: *Void contract - Moneylending agreement - Failure to use prescribed form - Schedules J & K of Moneylenders (Control and Licensing) Regulations 2003 - Exemption under PU(B) 35/2009 - Whether applied to plaintiff - Whether plaintiff could rely on s. 66 Contracts Act 1950 - Whether defendant accepted terms in agreement - Whether PU(B) 35/2009 overrides provisions of terms in agreement - Whether agreement void and unenforceable - Moneylenders Act 1951, s. 10P*

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CIVIL PROCEDURE: *Summary judgment - Triable issues - Moneylending transaction - Claim for monies due and owing - Moneylending agreement - Failure to use prescribed form - Schedules J & K of Moneylenders (Control and Licensing) Regulations 2003 -*

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- A *Exemption under PU(B) 35/2009 - Whether dispute arose as to actual amount due and owing - Whether interest charged in excess of statutory rate - Whether triable issues existed*

B The plaintiff, a licensed moneylending company, had loaned certain amount of monies to the defendant under two moneylending agreements. *Vide* this application for summary judgment ('encl. 6'), the plaintiff prayed for the recovery of the monies due to it under the said agreements, together with late payment charges. In alleging that there were triable issues, the defendant raised the following contentions, *ie*, (i) whether the moneylending agreements were void and unenforceable as they were not entered into in accordance with the prescribed form provided under the Moneylenders (Control and Licensing) Regulations 2003 ('Regulations') and thereby, under the Moneylenders Act 1951 ('Act'); (ii) whether the exemption by virtue of PU(B) 35/2009 was effective since its production in the plaintiff's affidavit as an exhibit was not a certified copy of a government gazette but a print out from a legal journal; (iii) whether there was a dispute as to the actual amount due and owing; (iv) whether the plaintiff was estopped from relying on the statutory exemption by virtue of cl. 4 of the moneylending agreements whereby the lender undertook to conform to the provisions and requirements of the Act; (v) whether there was a failure to comply with s. 21(1) of the Act in relation to the production of the statement of account as prescribed under s. 19; (vi) whether the plaintiff could rely on s. 66 of the Contracts Act 1950 in the event the moneylending agreements were void and unenforceable; and (vii) whether the plaintiff had charged interest in excess of the statutory rate. The defendant asserted, *inter alia*, that as the agreements were drafted in accordance with sch. J of the Regulations instead of the one in sch. K, the loans should thus be regarded as void and unenforceable.

Held (allowing encl. 6 with costs):

- H (1) A reading of reg. 10(1) of the Regulations and s. 10P of the Act in its entirety seeks to ensure that all moneylending transactions are in the forms prescribed under the Act or Regulations. It seeks to punish those persons who function as moneylenders and enter into agreements otherwise than as prescribed by the Act and the Regulations. However, on the facts, it was evident that the plaintiff had adopted the format set out in sch. J in keeping with the Regulations and the Act.

- As the plaintiff had in fact complied in spirit and principle with the Act and Regulations by utilising one of the forms prescribed, the use of the wrong form did not render the loan uncollectible. (paras 17 & 18) A
- (2) The lack of production of the original gazette did not detract from the validity of PU(B) 35/2009. It was entirely in order for the plaintiff to rely on a version as published by the Current Law Journal to provide evidence of its subsistence as the relevant PU number was clearly shown. In these circumstances, the plaintiff had provided a proper copy of the exemption which the court could take into consideration. The plaintiff was therefore exempt from complying with the provisions of the Act on the terms and conditions as set out in PU(B) 35/2009. As such, the fact that the second moneylending agreement was not in accordance with sch. K but was in the form prescribed by sch. J did not render it void and unenforceable by reason of the exemption. As for the first moneylending agreement which was entered into prior to the exemption in January 2009, the use of the wrong form did not render the loan unenforceable. (para 24, 26 & 27) B
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- (3) Upon a consideration of the moneylending documents in their entirety, it was evident that the plaintiff had, at all material times, advised the defendant fully of all deductions or retentions to be made in respect of the second moneylending agreement. It was, therefore, not tenable for the defendant at this juncture, when the monies were due and owing by her, to suggest that the terms were less than clear. Given the defendant's conduct in accepting the terms and the monies disbursed without contest or complaint, she was thus estopped from contending that the amount repayable by her was in dispute. Further, given the existence of the exemption under PU(B) 35/2009, the deductions or retentions by the plaintiff did not amount to a contravention of the Act. Hence, there was no triable issue in respect of this matter. (paras 31 & 32) F
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- (4) Section 21 of the Act envisages that where proceedings are taken in any court by a licensee for the recovery of any monies lent, the moneylender is to produce a statement of account as prescribed in s. 19. On the facts, the plaintiff had complied with the provisions of ss. 19 and 21 by producing a table or statement of account. Further, in view of the I

- A exemption, it was not fatal if the plaintiff did not issue a statement in accordance with s. 19. However, the plaintiff had done so in this case. Hence, there was no triable issue in respect of this matter. (paras 34 & 35)
- B (5) It is evident that PU(B) 35/2009 overrides the provisions of the moneylending agreements as it is a subsidiary legislation which carries the force of law. On the facts, no detriment was shown as to warrant an estoppel arising against the plaintiff. In any event, the plaintiff had complied with the provisions of the Act save for the inadvertent use of the wrong form in sch. J instead of sch. K. This issue, however, did not comprise a triable issue. (paras 37 & 38)
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- D (6) Since the moneylending agreements were not void and unenforceable, s. 66 of the Contracts Act 1950 did not come into play in terms of restitution. However, even if this court was wrong and the moneylending agreements were in fact void and unenforceable by reason of the use of the wrong form, or for non-compliance with ss. 19 and 21 of the Act, then s. 66 was directly applicable to allow the plaintiff to obtain restitution. Accordingly, s. 66 would be effective in allowing the plaintiff to claim compensation or restitution purely for the monies it loaned to the defendant. (paras 40, 41 & 43)
- E
- F (7) Under the Act and the statutory exemption, the plaintiff may not levy more than 12% interest in respect of secured loans. On the facts, there was no contravention of the Act or the statutory exemption in relation to this matter. Interest was levied at 8% as contracted. As the tenure of the facility was for two years, this amounted to 8% per year or 16% for two years. At the outset, a sum of RM60,000 was taken as upfront interest payment as a consequence of which the defendant did not have to make quarterly payments of RM20,000 for the first three quarters. The defendant's liability only arose in the fourth quarter and thereafter, until the 8th and final instalment when the entire sum loaned together with the interest became due and payable. In the circumstances, there was no question of the interest being levied at 16%. Therefore, this did not comprise a triable issue. (paras 44 & 45)
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Case(s) referred to:

Aseam Credit Sdn Bhd v. Eminent Avenue Sdn Bhd [2008] 1 CLJ 12 CA
(dist)

Boustead Trading (1985) Sdn. Bhd. v. Arab-Malaysian Merchant Bank Berhad [1995] 4 CLJ 283 FC (not foll)

MBF Cards Services Sdn Bhd v. Chew Ah Too [2009] 1 CLJ 140 CA (refd)
Yeep Mooi v. Chu Chin Chua & Ors [1960] 1 LNS 169 FC (refd)

Legislation referred to:

Contracts Act 1950, s. 66

Evidence Act 1950, ss. 76, 77, 115

Moneylenders Act 1951, ss. 10P(1), (2), (3), 19, 21(1)

Moneylenders (Control and Licensing) Regulations 2003, reg. 10(1)

For the plaintiff - Sean Ong (Christina Ang with him); M/s Lee Ong & Kandiah

For the defendant - M Moghan; M/s Moghan & Co

Reported by Kumitha Abd Majid

JUDGMENT**Nallini Pathmanathan J:**

[1] The plaintiff's claim against the defendant is for a return of monies loaned to her by the plaintiff together with late payment charges on the said sum. The plaintiff is a licensed money lending company incorporated in Malaysia.

Brief Facts

[2] The outline facts are comprehensively set out in the written submissions of learned counsel for the plaintiff and I adopt and reproduce in large part of those submissions in relation to the salient facts.

[3] At the defendant's request in or around December 2008, the plaintiff approved a credit facility in favour of the defendant in the sum of RM75,000 ('the first Credit Facility'). The plaintiff and the defendant then entered into a moneylending agreement (unsecured loan) dated 23 December 2008 ('the first moneylending agreement'). The form of the agreement was in accordance with schedule J of the Moneylenders (Control and Licensing) Regulations 2003 ('the Regulations') under the Moneylenders Act 1951. A copy of the said moneylending agreement was sent to the defendant, according to the plaintiff,

A on 23 December 2008 and the said sum was duly disbursed to her on the same date. This is not in issue. Pursuant to the terms of the first moneylending agreement the defendant was to repay the plaintiff a total sum of RM81,000 in one payment by 22 December 2009. The plaintiff complains that it failed to receive
B any payment from the defendant by the aforesaid due date of 22 December 2009 or thereafter. Accordingly a legal demand dated 20 April 2011 was issued to the defendant, which demand included 8% late payment interest per annum computed on a daily basis. This is in accordance with cl. 2 of the first moneylending
C agreement.

[4] The plaintiff also afforded a second or further credit facility to the defendant in the sum of RM1,000,000 (RM1 million) pursuant to a further request by the defendant in 2009. *Vide* letter
D of offer dated 18 March 2009, the plaintiff issued a letter of offer to the defendant stating that it had approved in principle a loan of RM1 million to her on specific terms. These terms included, *inter alia*, the following:

- E (i) A facility amount of RM1 million;
- (ii) An interest rate of 8% per annum calculated on a flat rate basis (as explained in the agreement);
- (iii) A term of 24 months;
- F (iv) Disbursement was to be made to the defendant after deductions of RM30,000 by way of an arrangement fee, up to RM14,000 for stamp duty and legal costs, upfront interest payment of RM60,000. The balance was to be
G disbursed to the defendant at an account nominated by her;
- (v) The facility was repayable on demand. Additionally the defendant was to repay the entire facility upon the expiry of the term of 24 months.
- H (vi) Upon expiry of the term or until a demand for repayment is made the instalment repayments of the facility were in eight instalments. The first to seventh instalment comprised RM20,000 each totalling RM140,000, while the eighth instalment payment upon expiry of the term comprised a sum
I of RM1,020,000. As such the total sum repayable by the defendant to the plaintiff is RM1,160,000;

- (vii) As security for this facility the plaintiff procured a private caveat and first party fixed charge over land in Pahang; and A
- (viii) There were several other terms and conditions set out in the letter of offer.
- [5] The defendant agreed to the terms and conditions in the letter of offer as borne out by her execution of the memorandum of acceptance. B
- [6] Thereafter, the plaintiff and the defendant entered into a moneylending agreement (unsecured loan) dated 24 March 2009 ('the second moneylending agreement') in accordance with schedule J of the Regulations. In like manner to the first moneylending agreement, the second moneylending agreement was sent to the defendant on 24 March 2009 and the principal sum duly disbursed on 25 March 2009. C D
- [7] Apart from the retained upfront interest payment that had been retained by the plaintiff prior to disbursement of the monies under the second moneylending agreement, and in breach of the express provisions of the same for a repayment of quarterly instalments, the defendant failed to make any other payments towards settling this facility. E
- [8] Upon maturity of this second credit facility in March 2011, the plaintiff's solicitors on 1 April 2011 issued a letter of demand for a sum of RM1,106,381.34 being the instalments from the fourth to eighth quarters together with 8% late payment interest per annum on a daily basis. The defendant however, failed, neglected or refused to settle the said sum. F
- [9] On or about 17 October 2012, *vide* letter dated 4 October 2012 the defendant wrote to the plaintiff seeking a postponement of the payment of the monies due under the second facility for a period of two months. After setting out her reasons for the request, the defendant hand wrote a note stipulating: 'Sebagai tanda komitmen saya berusaha membayar lima belas ribu ringgit sementara menunggu perincian proposal ...' To this end the defendant made a payment of RM15,000. The plaintiff utilised the said sum by way of part payment for the second credit facility. G H

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A [10] The said letter amounts to a clear admission of the defendant's liability to the plaintiff under the second moneylending agreement. As such *vide* this application for summary judgment the plaintiff seeks a recovery of the monies due to it under the first and second moneylending agreements.

B [11] In response to the plaintiff's claim the defendant raises the following issues which it is claimed, are triable:

C *Issue (1): Whether The First And Second Moneylending Agreements Are Void And Unenforceable As They Were Not Entered Into In Accordance With The Prescribed Form Provided Under The Regulations And Thereby The Act*

D [12] The defendant contends that the first and second moneylending agreements are void and unenforceable because they are drafted in accordance with schedule J, rather than schedule K of the Moneylenders (Control and Licensing) Regulations 2003, more particularly reg. 10(1). It is not in issue that both facilities were in fact granted with security and therefore the correct form to be utilised for both agreements should be schedule K rather than schedule J. In this regard reg. 10(1) of the Moneylenders (Control and Licensing) Regulations 2003 is relevant:

F Every agreement for moneylending transaction without security shall be in the form prescribed in Schedule J and where the agreement for moneylending transaction with security shall be in the form prescribed in Schedule K and any moneylender who executes moneylending agreement other than any of the Schedules commits an offence under the Act and shall on conviction be liable to a fine and imprisonment specified under subsection 10P(2) of the Act.

G [13] The defendant also points to s. 10P(3) of Part V of the moneylenders Act which provides:

H (3) Any moneylending agreement which does not comply with the prescribed form shall be void and have no effect and shall not be enforceable

I [14] The defendant essentially contends that as the agreements were entered into in Form J which deals with unsecured loans, rather than Form K which deals with secured loans, the two loans should be regarded as void and unenforceable.

[15] It is apparent from the foregoing that reg. 10(1) and s. 10P(3) fall for consideration and construction. Is the effect of the two provisions such that in the event the plaintiff inadvertently utilises the wrong form for the grant of a moneylending transaction, the entire transaction becomes void and unenforceable?

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[16] The other relevant parts of s. 10P provide as follows:

(1) A licensee who intends to lend money to a borrower shall enter into a moneylending agreement with the borrower and that agreement shall be in the prescribed form.

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(2) Any licensee who contravenes this section shall be guilty of an offence under this Act and shall be liable to a fine of not less than ten thousand ringgit but not more than fifty thousand ringgit or to imprisonment for a term not exceeding five years or to both, and in the case of a second or subsequent offence shall also be liable to whipping in addition to such punishment...

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[17] A reading of reg. 10(1) and s. 10P in its entirety appears to this court, to seek to ensure that all moneylending transactions are in the forms prescribed under the Act or Regulations. It seeks to punish those persons who function as moneylenders and enter into agreements **otherwise than as prescribed by the Act and the Regulations**. (emphasis added). In other words if a moneylender has executed a moneylending agreement which is not in either the prescribed form J or K or as otherwise provided under the Regulations and seeks to bind the borrower to terms and conditions which are inconsistent with or different from that set out in schedule J or K then such a moneylending agreement would be void and unenforceable.

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[18] In the instant case here however it is evident that the plaintiff has infact adopted the format set out in schedule J in keeping with the Regulations and the Act. The plaintiff's error was in utilising the wrong form, ie, the unsecured loan form rather than the secured loan form. The next issue that falls for consideration is whether on a reading of reg. 10(1) and s. 10P(1) - (3) the loan disbursed to the defendant under schedule J is therefore deemed void and unenforceable. This does not appear to be the correct construction to be accorded to these provisions. As stated earlier the mischief that the Act and Regulations promulgated under seek to contain or prevent, is the forcing upon borrowers of onerous and punishing terms and conditions in relation to moneylending

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- A transactions. To this end specific forms have been set out, the use of which is mandatory. As the plaintiff here has in fact complied in spirit and principle with the Act and Regulations by utilising one of the forms prescribed it does not appear to this court that the use of the wrong form renders the loan uncollectible. That might well have been the case if the plaintiff had utilised neither Forms J or K or any other form prescribed by the Act. But that is not the case here.

- C [19] As such it appears to this court upon a reading of these provisions that the correct construction to be accorded to these provisions is to render void and unenforceable any moneylending agreement which fails to comply with any of the forms prescribed by the Act or Regulations. To determine otherwise, to my mind would lead to an absurdity. The net result would be that the plaintiff would be deprived of recovering monies it loaned to the defendant simply because it utilised the wrong form, *albeit* one prescribed under the Act. This appears to be an untenable construction to adopt.

- E [20] In *MBF Cards Services Sdn Bhd v. Chew Ah Too* [2009] 1 CLJ 140; [2009] 1 MLJ 684, the Court of Appeal laid down the principle to be applied when construing a particular clause in a statute:

- F ... The test thus is to see whether the interpretation is a sound one or not. If it leads to some injustice and/or absurdity, then a need arises to gauge the real and true intention of the Legislature (Interpretation of Statute by Bindra at page 235). Obviously a harmonious construction should be given in order to avoid making one provision of the Act conflict with the other...

- G [21] Accordingly, I concur with learned counsel for the plaintiff that in order to read or construe reg. 10(1) and s. 10P(1) to (3) harmoniously these provisions should be read to mean that it is mandatory that any moneylending transaction entered into under the Act should conform in principle with the format prescribed thereunder. As that has in fact been done in the instant case, simply the wrong form that was utilised it follows that the loan is not rendered unenforceable.

- I [22] Alternatively, the plaintiff contends that it is exempt from complying with the strict provisions of the Act by reason of an exemption obtained by it with effect from 26 January 2009. The plaintiff points out that an 'exemption under subsection 2A(2)

PU(B) 35/2009' was procured by it with effect from 26 January 2009 for a term of five years. The defendant however maintains that this exemption produced by the plaintiff and duly gazetted has no legal effect. These matters comprise the second 'triable' issue, according to the defendant.

Issue (2): Is The Exemption Procured By The Plaintiff Effective Or Otherwise?

[23] The defendant contends that the exemption produced by the plaintiff both in its affidavit and in the bundle of authorities, namely PU(B) 35/2009, has no legal effect because the exhibit produced in the affidavit is not a certified copy of a government gazette but a print out from a legal journal. The relevant gazette was not produced. In this context the defendant relies on the case of *Aseam Credit Sdn Bhd v. Eminent Avenue Sdn Bhd* [2008] 1 CLJ 12 where the creditor, also a moneylender, produced only a letter from the Ministry of Housing and Local Government advising of the existence of an exemption, rather than the exemption itself. In these circumstances the Court of Appeal held that the letter was insufficient to show proof of exemption. The relevant gazette had to be made available. It was held that the non-production of the gazette and the attempt to rely solely on the letter was not a mere irregularity and could not amount to proof of exemption.

[24] It is clear from the foregoing that the said case is entirely distinguishable from the present where it is not an issue that such a gazette does indeed exist as shown by the plaintiff in its exh. MSJ-8. It is entirely in order for the plaintiff to rely on a version as published by the Current Law Journal to provide evidence of its subsistence as the relevant PU number is clearly shown. It is in subsidiary legislation in respect of which the plaintiff has provided a copy. The exemption clearly refers solely to the plaintiff and provides exemption for a period of five years with effect from 26 January 2009. In these circumstances I am satisfied that the plaintiff has provided a proper copy of the exemption which the court can take into consideration. In other words it is of legal effect. The lack of production of the original gazette does not detract from the validity of PU(B) 35/2009.

A [25] The defendant further submitted that the plaintiff was bound to provide a certified true copy of the exemption in accordance with ss. 76 and 77 of the Evidence Act 1950. It is trite that in matters involving affidavit evidence such as the present, the provisions of the Evidence Act have no application.

B [26] I am therefore satisfied that issue (2) does not comprise a 'triable' issue. The plaintiff was therefore exempt from complying with the provisions of the Moneylender's Act on the terms and conditions set out in PU(B) 35/2009. As such the fact that the
C second moneylending agreement was not in accordance with Form K but was in the form prescribed by Form J does not render it void and unenforceable by reason of the exemption.

D [27] With respect to the first moneylending agreement, as it was entered into prior to the exemption January 2009, it follows that the exemption does not apply. However the issues raised in (i) are applicable and I have concluded there that the use of the wrong form does not render the loan unenforceable.

E *Issue (3): Dispute On The Actual Amount Loaned And Therefore Owed By The Defendant To The Plaintiff*

[28] In essence the defendant queries the non-disbursement or retention of:

- F (i) The arrangement fee of RM30,000; and
(ii) The upfront interest payment of RM60,000.

G [29] This the defendant maintains conflicts with the plaintiff's statement of account which shows a disbursement of RM1 million without any deductions. This it is contended gives rise to a serious issue to be tried in relation to the actual amount due and owing.

H [30] In response to this, the plaintiff points to the letter of offer issued to the defendant dated 18 March 2009 where it is expressly provided that an arrangement fee in the sum of RM30,000 as well as an upfront interest payment of RM60,000 comprising instalments 1-3 of the repayment sums, would be retained or deducted at the outset. The defendant accepted these express terms as set out in the memorandum of acceptance
I executed by her.

[31] The defendant moreover never challenged or took umbrage at these deductions throughout the tenure of the second facility until the commencement of legal proceedings. Upon a consideration of the moneylending documents in their entirety, it is evident that the plaintiff at all material times advised the defendant fully of all deductions or retentions to be made in respect of the second moneylending agreement. It is therefore not tenable for the defendant at this juncture, when the monies are due and owing by her, to seek to suggest that the terms are less than clear. This is a fit case for the application of the doctrine of estoppel. The defendant saw fit to accept the terms as set out in the letter of offer and which make clear all deductions and retentions, then went on to accept the RM1 million less the deduction and retention sums for a period of two years without questioning the same. The plaintiff acted to its detriment in disbursing the sums it had agreed to do so, expecting to be repaid under the terms of the agreement, after two years and in a specified sum which included interest. Given the defendant's conduct in accepting the terms and the monies disbursed without contest or complaint, she is estopped from now contending that the amount repayable by her is in dispute.

[32] Further given the existence of the exemption under PU(B) 35/2009, the deductions or retentions by the plaintiff do not amount to a contravention of the Act. It appears to this court that this too does not comprise a 'triable' issue.

Issue (4): Has There Been A Failure To Comply With Section 21(1) Of The Moneylender's Act?

[33] The defendant refers to ss. 21 and 10 and contends that a moneylender such as the plaintiff is bound to produce a statement of account as prescribed in s. 19. Section 19 in turn requires the statement of account to show the amount of principal and the rate of interest. The defendant complains that in para. 8 of the statement of claim the plaintiff did not specify the actual amount actually released to the borrower after the deduction of the arrangement fee and the upfront interest payment.

[34] The plaintiff maintains that it has complied with the provisions of s. 19 of the Act notwithstanding the exemption. The plaintiff points to the annexure to the writ in this action which sets out in tabular form in full the principal amount as well

- A as the interest levied in respect of the loan under the second moneylending agreement. It is apparent from a perusal of the same that the table or statement of account has been produced in compliance with the provisions of ss. 19 and therefore 21. (Section 21 envisages that where proceedings are taken in any court by a licensee for the recovery of any monies lent, the moneylender is to produce a statement of account as prescribed in s. 19).
- B

- C [35] Further and in any event, in view of the exemption, it is not fatal if the plaintiff does not issue a statement in accordance with s. 19. However despite this, the plaintiff has done so. Therefore this too cannot comprise a 'triable' issue.

Issue (5): The Plaintiff Is Estopped From Relying On The Exemption By Virtue Of Clause 4 In The Moneylending Agreements

- D [36] The defendant contends that the doctrine of estoppel comes into play to preclude the plaintiff from relying on the statutory exemption by reason of cl. 4 of the moneylending agreements whereby the lender undertook to conform to the provisions and requirements of the Moneylenders Act 1951. The defendant relies on s. 115 of the Evidence Act 1950 and *Boustead Trading (1985) Sdn Bhd v. Arab-Malaysian Merchant Bank Berhad* [1995] 4 CLJ 283 ('Boustead Trading') in putting forward this contention.
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- F [37] It is evident that PU(B) 35/2009 overrides the provisions of the moneylending agreements as it is subsidiary legislation which carries the force of law. Therefore estoppel does not come into play. In any event as pointed out earlier the provisions of the Evidence Act are inapplicable in applications involving affidavit evidence. *Boustead Trading* is inapplicable on the facts of this case.
- G It has not been shown how the defendant has acted to its detriment so as to warrant an estoppel arising against the plaintiff in its favour. Clause 4 in itself is, to my mind, insufficient to give rise to such an estoppel.
- H [38] Finally and in any event, the plaintiff has, as a matter of fact complied with the provisions of the Moneylender's Act save for the inadvertent use of the wrong Form J instead of K. This issue does not comprise a 'triable' issue.

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Issue (6): If The Moneylending Agreements Are Void And Unenforceable, Is The Plaintiff Entitled To Recover The Monies Loaned Under Section 66 Of The Contracts Act 1950? **A**

[39] Section 66 provides as follows:

66. When an agreement is discovered to be void, any person who has received any advantage under the agreement or contract is bound to restore it, or to make compensation for it to the person from whom he received it. **B**

[40] I have found above that the moneylending agreements are NOT void and unenforceable. Accordingly s. 66 does not come into play in terms of restitution. **C**

[41] However even if I am wrong and the moneylending agreements are in fact void and unenforceable by reason of the use of the wrong Form J instead of Form K, or for non compliance with ss. 19 and 21 of the Act, it appears to this court that s. 66 is directly applicable to allow the plaintiff to obtain restitution. **D**

[42] The defendant however maintains that s. 66 is not applicable according to the Federal Court decision of *Yeep Mooi v. Chu Chin Chua & Ors* [1960] 1 LNS 169 where it was held, *inter alia*, in construing s. 66 as follows: **E**

...An agreement 'discovered to be void' does not mean that the contract is void on discovery or void because of discovery of illegality. It means what it says, in that the contract was *void ab initio* without the parties at the time being aware of the rue legal position. It is only later that the contract is found to be void and so they become aware of its voidness. We are of the view therefore that section 66 of the Contracts Act applies to this and the appellant is entitled to the restitution of her money by the pawnshop which received an advantage from its use... **F**

[43] The foregoing proposition assists the plaintiff's alternative case. Here too although the issue of the moneylending agreements being void is only being raised at this juncture, it does not detract from the fact that, if the defendant is correct in its submissions in relation to issues 1 and 2, the moneylending agreements are effectively *void ab initio*. According to the defendant the two moneylending agreements are void because they are in the **H**

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- A prescribed form J rather than K. If this is correct, then it would follow that the agreements are in fact *void ab initio*, although discovered subsequently. Accordingly s. 66 would be effective in allowing the plaintiff to claim compensation or restitution for purely the monies it loaned to the defendant. Therefore this contention
- B also fails.

Issue (7): Has The Plaintiff Charged Interest In Excess Of The Statutory Rate?

- C [44] It is not in issue that both under the Moneylenders Act and the statutory exemption, the plaintiff may not levy more than 12% interest in respect of secured loans. The defendant contends on its reading of the plaintiff's statement of account as exh. in "MSJ-6" that the plaintiff has charged 16% interest on the first day of the loan. Again it is contended that this renders the loan
- D unenforceable or illegal.

- [45] Learned counsel for the plaintiff in response to this refers to exh. MSJ-1 and MSJ-2, namely the two agreements, on the last page of the same which disclose that the rate of interest under
- E each agreement was 8% per annum and not 16% per annum as suggested. If RM160,000 as is contended by the defendant is interest comprising 16%, then as the tenure of the facility was for two years, this amounts to 8% per year or 16% for two years. Therefore there is no contravention of the Act or the statutory
- F exemption. In the instant case at the outset a sum of RM60,000 was taken as 'upfront interest payment' as a consequence of which the defendant did not have to make quarterly payments of RM20,000 for the first three quarters. As explained earlier, her liability only arose in the fourth quarter and thereafter until the
- G eighth and final instalment when the entire sum loaned together with interest became due and payable. In these circumstances there is no question of interest being levied at 16% as contended by the defendant. Interest was levied at 8% as contracted. Therefore this does not comprise a 'triable' issue.

- H [46] I am satisfied that the plaintiff has made out a *bona fide* claim for a return of monies loaned together with late payment charges and that the defendant has raised no triable issues. The defendant has in fact admitted that the monies claimed are in fact due and
- I owing but sought in the course of her letter of 4 October 2012 to procure further time to restructure and repay the loan. In these

circumstances the plaintiff is entitled to judgment as prayed for in its summary judgment application in encl. 6. The plaintiff is therefore granted an OIT of encl. 6, namely: **A**

(i) A sum of RM100,617.53 as at 31 December 2012 under the first credit facility; **B**

(ii) Late payment charges at the rate of 8% under the first credit facility on the sum of RM81,000 from 1 January 2013 until the date of realisation;

(iii) A sum of RM1,244,963.80 as of 31 December 2012 under the second credit facility; **C**

(iv) Late payment charges at the rate of 8% per annum under the second credit facility on the sum of RM1,085,000 from 1 January 2013 until the date of realisation; and **D**

(v) Costs of RM15,000 payable by the defendant to the plaintiff.

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